



ATTORNEYS AT LAW

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EEOC Issues New Guidance Regarding the Use of Arrests and Conviction Records

On April 25, 2012, the Equal Employment Opportunity Commission (“EEOC”) released Enforcement Guidance outlining the EEOC’s position on employers’ use of conviction and arrest records in the job-screening process. While the EEOC Guidance does not prohibit the use of criminal background checks in the job-screening process, the EEOC has limited the weight that employers may place on an applicant’s criminal record. Generally speaking, an employer could be in violation of Title VII if the employer treats criminal history differently for different applicants based on the applicant’s race, or if the employer has a policy that has an across-the-board exclusion for all applicants who have a criminal record.

What is Not Allowed

An employer is not allowed to disqualify an applicant based on a simple answer of “yes” to a question on an application concerning criminal history. According to the EEOC Guidance, policies that exclude applicants for any conviction, without taking into account when the conviction occurred, the nature of the conviction and the nature of the position sought are likely to be in violation of Title VII.

The EEOC Guidance has not changed the EEOC’s recommendations regarding the use of arrest records. The EEOC continues to apply a general rule prohibiting the consideration of arrest records because an applicant’s arrest record does not establish that criminal conduct has actually occurred. Therefore, the EEOC is likely to find that the use of arrest records to exclude an applicant is a violation of Title VII.

What the Policy Should Contain

The EEOC outlined a number of requirements and recommendations for employers’ policies concerning criminal convictions. If an employer wants to adopt a policy that excludes applicants based on convictions for certain crimes, the employer needs to show that the policy effectively links the specific criminal conduct and its dangers with the duties of a particular position. Essentially, the exclusion has to be job related.

The EEOC Guidance recommends that the policy be in writing and should:

- Identify the job requirements, including the circumstances under which the job is performed;
- Identify specific offenses that may demonstrate unfitness for performing such jobs;
- Identify the duration of the disqualification; and
- Include a requirement for individualized assessment that gives an applicant the opportunity to explain why the exclusion should not apply to him.

Recommendations for Employers

Based on the EEOC Guidance, we recommend that employers develop a “targeted screen” that considers three things in deciding the weight to give an applicant’s criminal conviction: (1) the nature of the criminal offense or conduct; (2) the time that has elapsed since the conviction or completion of the sentence; and (3) the nature of the job position held or sought. When receiving information from employees or potential employees regarding convictions, employers should always consider the nature of the criminal conduct, when it occurred, and how the conviction relates to the position sought or being performed by the individual. Finally, applicants and/or employees should be given the opportunity to explain the nature and circumstances that resulted in their conviction. Employers should always keep information concerning applicants and employees’ criminal records confidential.

The EEOC Guidance can be accessed at:
http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. Please contact Denis Jacobson at (336) 271-5242, Ross Hamilton at (336) 271-5279, or Sarah Hayward at (336) 271-5256 if you have any questions concerning these regulations and guidance.

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